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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

MOLLY DWYER, ACTING CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. PORTER,

Petitioner - Appellant,

v.

JOE MCGRATH; et al.,

Respondents - Appellees.

No. 06-16124

D.C. No. CV-03-05339-TAG

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Theresa A. Goldner, Magistrate Judge, Presiding

Submitted February 26, 2008^{**}

Before: BEEZER, FERNANDEZ and McKEOWN, Circuit Judges.

California state prisoner James E. Porter appeals pro se from the denial of his 28 U.S.C. § 2254 petition, challenging his jury-trial conviction for forcible

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3. Petitioner's request for publication is denied.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

rape, unlawful penetration by a foreign object, and unlawful oral copulation. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Porter contends that the admission of evidence that he committed a prior sexual offense violated his rights to due process because it undermined the fairness of his trial. Porter also contends that California Evidence Code § 1108 violates his right to equal protection because it discriminates against defendants charged with sexual offenses. There is no clearly established Supreme Court precedent that prohibits the admission of propensity evidence in a state proceeding. *See Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991). Furthermore, Porter's equal protection challenge is without merit because he has not shown that he is a member of a suspect class or that the challenged provision burdens a fundamental right. *See United States v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001). Accordingly, we conclude that the state court's decision on this issue was not contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

We construe Porter's presentation of uncertified issues as a motion to expand the certificate of appealability. *See* 9th Cir. R. 22-1(e). So construed, we deny the motion. *See Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.